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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/065,326	10/03/2002	Steven Curtis Zicker	7017	9314

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EXAMINER	
KIM, JENNIFER M	

ART UNIT	PAPER NUMBER
1617	

MAIL DATE	DELIVERY MODE
04/14/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/065,326	ZICKER ET AL.	
	Examiner	Art Unit	
	Jennifer Kim	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *09 January 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-11* is/are pending in the application.

4a) Of the above claim(s) *8* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-7, 9-11* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

The amendment filed on January 9, 2008 have been received and entered into the application.

Terminal Disclaimer

The application/patent being disclaimed has been improperly identified since the number used to identify the 10/065,326 being disclaimed is incorrect. **The correct number is 10/912,864.**

Action Summary

The rejections of claims 1-5, 7 and 9-11 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over copending Application No. 10/912,864 and 11/057718 are being **maintained** for the reasons stated in the previous Office Action.

The rejection of claims 1- 7 and 9-10 under 35 U.S.C. 103(a) as being unpatentable over Davenport et al. (A) (WO 2004/006688A1) in view of Davenport et al. (B) (US 2003/0194478A1) is hereby expressly **withdrawn** in view of Applicants' declaration.

The rejection of claims 1-7 and 9-11 under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247A1) is being **maintained** for the reasons stated in the previous Office Action.

Response to Arguments

Applicant's arguments filed January 9, 2008 have been fully considered but they are not persuasive. Applicants argue that the filed Terminal Disclaimer of 10/912,864 obviated the rejection and that the rejection should be withdrawn. However, this is not persuasive because the application being disclaimed has been improperly identified since the number used to identify the 10/065,326 being disclaimed is incorrect. **The correct number is 10/912,864.** Applicants argue that the '718 Application are drawn to a means for a methods of influencing a physiological condition (joint disorder) and the rejected claims drawn to a means for and method of influencing behavior, which manifests the psychological condition of the animal. This is not found persuasive because the both sets of claims encompassed the same method step of administration of the same compound to the same subject population to be treated. It is suggested to amend the claims to insert distinct subject population to be treated as "an animal in need thereof" in order to overcome this rejection. Applicants argue that Reinhart (EP 0687257 A1) requires both of the omega-3 fatty acid and the omega-6 fatty acids. This is not found persuasive because instant claims drawn to "comprising" do not exclude "omega -6 fatty acids". The term "comprising", which is synonymous with "including,"

"containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. Applicants argue that Reinhart is squarely intended for the reduction of skin irritation in a pet animal and therefore, the skilled artisan of the day would not have looked to a means and method for ameliorating dermatitis or purities in a dog for guidance in searching for a means and method for influencing, for example, any behavior associated with canine ARCD, as Applicants' inventive method does. This is not found persuasive because the term "behavior" encompasses one's action or reaction under specified circumstances. In this case, the teaching of Reinhart would influence the behavior of the animals because Reinhart teaches the product improved the general comfort and well-being of the animals by improving skin conditions. One of ordinary skill in the art would recognize that the animals that have consumed such product would have better or different behavior because the product improved the general comfort and well-being of the animals. There is a reasonable expectation of successfully influencing behavior of the dog by providing comfort food that actually improves general comfort and well-being of the animals. Thus, the claims fail to patentably distinguish over the state of the art as represented by the cited references.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the

unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-5, 7 and 9-11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of copending Application No. 10/912,864. Although the conflicting claims are not identical, they are not patentably distinct from each other because the animal population (an animal) to be treated in the instant claims overlap and encompasses the specific population (a dog having osteoarthritis) of claims in the copending Application. Further, the instant claims and the claims in the copending Application involves same method step of administering same active agent. As such, the claimed method for influencing behavior in an animal would obviously achieved upon administration of the same active agent to the overlapping population involving same method step taught by the copending claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-5, 7 and 9-11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 7, 13, 19 and 26-29 of copending Application No. 11/057,718. Although the conflicting claims are not identical, they are not patentably distinct from each other because the animal population (an animal) to be treated in the instant claims overlap and encompasses the specific population (a dog having arthritis) of claims in the copending Application. Further, the instant claims and the claims in the copending Application involves same method step of administering same active agent. As such, the claimed method for influencing behavior in an animal would obviously achieved upon administration of the same active agent to the overlapping population involving same method step taught by the copending claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-7 and 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247A1).

Reinhart teaches a pet food product containing omega-6 and omega-3 fatty acids from 3:1 to 10:1 and wherein at least 3% of the total fatty acids in the composition are the omega-3 fatty acids and that omega-3 fatty acids can be eicosapentaenoic acid and docosahexaenoic acid. (page 6, claims 1 and 2, claim 6). The amount of omega-3 fatty acid taught by Reinhart is within the amount set forth in claim 11. Reinhart teaches the product improved the general comfort and well-being of the animals. (page 6, lines 16-24).

Reinhart does not expressly teach the influencing behavior in an animal.

It would have been obvious to one of ordinary skill in the art that animals treated with the pet food product of Reinhart would influence the behavior of the animals because Reinhart teaches that pet food product improved the general comfort and well-being of the animals. One of ordinary skill in the art would recognize that the animals that have consumed such product would have better or different behavior because the product improved the general comfort and well-being of the animals. There is a reasonable expectation of successfully influencing behavior of the dog by providing comfort food that actually improves general comfort and well-being of the animals.

For these reasons the claimed subject matter is deemed to fail to patentably distinguish over the state of the art as represented by the cited references. The claims are therefore properly rejected under 35 U.S.C. 103.

None of the claims are allowed.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jennifer Kim whose telephone number is 571-272-0628. The examiner can normally be reached on Monday through Friday 6:30 am to 3 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from

the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jennifer Kim/
Primary Examiner, Art Unit 1617

Jmk
April 10, 2008